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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 449

BEDFORD F. FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 8-12) is reported at 98 F. Supp. 349.

JURISDICTION

The judgment of the Court of Claims was entered on July 9, 1951 (R. 12). A motion for a new trial, filed on July 24, 1951 (R. 13), was denied on October 2, 1951 (R. 13). The petition for a writ of certiorari was filed on November 29, 1951. The

jurisdiction of this Court is presumably invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

In 1944, while active fighting was in progress at St. Malo, France, petitioner, then an intelligence officer in the U. S. Army, found a woman's overnight bag which contained, among other things, a large sum of money in French francs. Petitioner advised his superior officer of this find and turned the money over to the Army Finance Officer as he was required to do under the criminal sanctions of Article of War No. 80, *infra*, p. 13.[1] Over his protest, he was given a receipt classifying this money as captured enemy, and not as found, property. In 1947, he made demand for the dollar equivalent of this money on the theory that, as the finder of the money, he was entitled thereto, which demand was refused.

The question presented is whether the Court of Claims erred in refusing to enter judgment for petitioner.

CONVENTION AND ARTICLES OF WAR INVOLVED

The provisions of the Annex to the Hague Convention respecting the Laws and Customs of War on Land of October 18, 1907 (36 Stat. 2277, 2295) and of the Articles of War (41 Stat. 787, 10 U.S.C. 1472 ff) are set forth in pertinent part in the Appendix, *infra*, pp. 12-13.

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[1] Hereinafter the Articles of War will be referred to as A. W.

STATEMENT

In August 1944, petitioner, then a Major in the Army of the United States, was serving as an intelligence officer attached to the 83d Division. At that time this Division was seizing the city of St. Malo in France. Prisoners were being taken and civilians were fleeing the city avoiding the main highways in view of German shell fire. In those circumstances, petitioner came across an overnight bag containing women's clothing and a purse filled with a large number of French 1000 franc notes. The owner of the bag never has been ascertained. Petitioner immediately took the purse and its contents to the command post about 100 yards distant and advised his superior officers of his find. (R. 6.) A day or two later he sent the purse to the Division Finance Officer by messenger. The messenger was given a receipt for $4,129.12 [the dollar equivalent of the notes] "collection of French currency abandoned by German troops, discovered & turned over to Finance Officer * * * by remitter". (R. 7.)

Several days later, petitioner went to the Finance Officer in order to complain about the wording of the receipt, claiming that the money was civilian property which he had found. In the absence of the Finance Officer, his assistant refused to change the wording of the receipt, but offered to return the money to petitioner. This, however, was not agreeable to petitioner. (R. 7.)

In November, 1947, *i.e.* more than three years later, petitioner made demand for the money on the Department of the Army which was denied on the ground that A. W. 80 negatived any rights he might have as a finder (R. 7-8).

Petitioner thereupon brought suit in the Court of Claims which was dismissed (R. 12). The Court held (a) that no promise, express or implied in fact, to return the money to petitioner could be found in view of the Government's adverse claim to the money (R. 9-10) and (b) that petitioner had no property interest in the money found by him; pursuant to A. W. 80, he acted as the agent of the United States when he found the money and the finder's rights vested in the Government, not in him (R. 10-12).

ARGUMENT

Petitioner contends that the Court of Claims erred in approving the action of the Department of the Army in rejecting his claim on the ground that the money was either captured enemy property, which belongs to the United States (A. W. 79,[2] *infra*, pp. 12-13) or civilian property, in which petitioner could not acquire any finder's right, since he acted merely as the agent of the United

[2] The Articles of War were repealed by the Act of May 5, 1950 (64 Stat. 107) establishing the Uniform Code of Military Justice (Sec. 14(a)). The same section, however, provides that this repeal does not effect "any substantive rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act" (May 31, 1951, cf. Sec. 5, 64 Stat. 145, 50 U.S.C. (Supp. IV) Note preceding 551).

States (A. W. 80, *infra*, p. 13). We submit that the decision below is correct. The case is unique and does not warrant review.[3]

1. Concededly, the only ground upon which the Court of Claims could entertain petitioner's claim is a Fifth Amendment taking. Assuming, for the sake of argument, that the court below was right in stating that a claim for a wrongful withholding of found property from the finder by the United States under an adverse claim of title constitutes a taking under the Fifth Amendment of which the Court of Claims has jurisdiction,[4] petitioner has failed to establish that the withholding is wrongful. Any finder's interest in the money found in France would have arisen under laws of France which have neither been pleaded nor proved by petitioner; moreover under the military laws of the United States all rights which resulted from the finding of the money vested in the United States.

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[3] While petitioner urges that the question is one of importance, we are unaware of any other cases, either adjudicated or pending, involving the question here presented. Inasmuch as hostilities incident to World War II terminated over six years ago, it is doubtful if another case of this precise character will arise.

[4] See opinion below (R. 10-11); but see *Pearson* v. *United States*, 267 U.S. 423, 427; *Klebe* v. *United States*, 263 U.S. 188, 191-192; *Tempel* v. *United States*, 248 U.S. 121, 129-130; *Basso* v. *United States*, 239 U.S. 602.

The finder's action to regain possession of the property found by him has been traditionally in trover, *i.e.*, in tort. *Armory* v. *Delamirie*, 1 Str. 505, 93 Eng. Rep. 664 (1722); 2 Kent, *Commentaries* 356. Accordingly, in the absence of a Fifth Amendment taking, the Court of Claims would be without jurisdiction.

a. Under the generally recognized rules governing the conflicts of laws, the creation of an interest in personal property is governed by the law of its situs.[5] Thus the issue, whether petitioner would acquire a finder's rights in the money found by him if he were a private citizen, is governed by the laws of France. Foreign laws are questions of fact which, in the federal courts, must be pleaded and proved.[6] Petitioner has failed to do either (cf. his petition in the Court of Claims, R. 1-2); nor did the Court of Claims make any pertinent special findings of fact (R. 6-8).[7] The references to French law contained in the petition (Pet. 6) cannot supply the missing allegation, proof, and findings.[8]

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[5] *Disconto-Gesellschaft* v. *U. S. Steel Co.*, 267 U.S. 22, 28; *Banque de France* v. *Chase Nat. Bank*, 60 F. 2d 703 (C.A. 2); *Restatement of the Law of Conflict of Laws*, Secs. 255-258; 2 Beale, *Conflict of Laws*, Sec. 255.4.

[6] *United States* v. *Spelar*, 338 U.S. 217, 218; *Black Diamond S. S. Corp.* v. *Stewart & Sons*, 336 U.S. 386, 397; *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 479.

[7] The assumption by the Court of Claims in the opinion that under the French law applicable to private persons petitioner is entitled to the money against all the world, except the loser, cannot take the place of the required finding. *United States* v. *Causby*, 328 U.S. 256, 267, and authorities cited there.

[8] The state of the French law with respect to the finding of lost property is extremely doubtful. It is uncertain whether an actionable interest accrues to the finder after three or thirty years, especially where he has not complied with regulations requiring the deposit of the found object with the police. In addition, there are serious questions as to whether the ordinary law of lost property applies to property abandoned as the result of military events. Cf. Planiol-Ripert, *Traité Elementaire de Droit Civil* (11th Ed., 1928) Secs. 2584-2588; Colin-Capitant, *Cours Elementaire de Droit Civil Français* (11th

b. Assuming, however, that petitioner, if he were a private person, had acquired an actionable interest in the money found by him, he still cannot succeed. For, although French law governs basically the rights of a person who finds personal property in France, the legal relations between the United States and the members of its armed forces are subject to federal law.[9] And under federal military law a soldier who finds lost or abandoned property on the battlefield does not acquire an interest in the found object on his own behalf; he acts as an agent for the United States.

A. W. 80 (*infra*, p. 13) requires a person subject to military law[10] who comes into possession of captured or abandoned property to give notice thereof to the proper authority and to turn such property over to it. The court below rightly held that A. W. 80 indicates a policy to the effect that a soldier may not gain a personal profit out of the flight and disorder which ensue from war, and that if he finds any lost property the finder's rights accrue to the Government for which he merely acted as an agent (R. 11-12).

Ed., 1947) Secs. 1218, 1219; Dalloz, *Nouveau Répertoire, sub verbo Propriété*, pars. 180, 181; Schlegelberger, *Rechtsvergleichendes Handwörterbuch* (1929), Vol. 3 (*Fund und Schatzfund*), p. 556.

[9] *Feres* v. *United States*, 340 U.S. 135, 143-144; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306; *United States* v. *Sharpe*, 189 F. 2d 239, 241 (C.A. 4).

[10] Petitioner as an Army officer (R. 1) was subject to military law (A. W. 2, *infra*, p. 12).

The purpose of A. W. 80 is twofold. It seeks to prevent looting and pillage [11] for humanitarian [12] and disciplinary reasons [13] and also to secure the Government's rights to public enemy property.[14] It is essentially a preventive measure which has been strengthened by subsidiary Army regulations [15] and orders issued from time to time to the troops to the effect that they could not utilize their presence in occupied territory or on the battlefield for private gain.[16] This salutary purpose of A. W. 80 would be seriously jeopardized, if not entirely destroyed, if a soldier, after turning over to the

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[11] On the historical and factual aspect of pillage, cf. Spaight, *War Rights on Land*, 188-201.

[12] Annex to the Hague Convention of Oct. 18, 1907, Concerning the Laws and Customs of War on Land, 36 Stat. 2277 (hereinafter referred to as Hague Convention) Art. 47: "Pillage is formally forbidden."

[13] Cf. A. W. 75 (*infra*, p. 12). On the disastrous effect of the dispersal of soldiers for the purpose of looting, see Spaight, *War Rights on Land*, 192-196.

[14] Pursuant to A.W. 79 all public property taken from the enemy is property of the United States. Cf. Hague Convention, Art. 53 (*infra*, p. 12).

The close interrelation of these considerations is evidenced by the Uniform Code of Military Justice (64 Stat. 108, 50 U.S.C. (Supp. IV) 551 ff.) which in a single article (Art. 103, 50 U.S.C. (Supp. IV) 697) deals with securing captured public enemy property, looting, and the failure to report and turn in captured or abandoned property.

[15] War Department Field Manual FM 27-10, Rules of Land Warfare, par. 328: "*Private gain by officers and soldiers prohibited*—Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate."

[16] Cf. the orders quoted in *U. S.* v. *Mellinger*, (CM 307097), 60 Holdings, etc. of the Board of Review, Office of the Judge Advocate of the Army, 199, 201-203.

proper authorities looted private property[17] or abandoned enemy funds, could several years later, after the witnesses have been dispersed, claim a finder's right.[18] Similarly, if a soldier could enforce a finder's right with respect to private property he would be seriously tempted to declare seized public funds as private property which he had found.

The law does not favor such conflicts of interest between the Government and its officers. Thus, it has been held in a number of jurisdictions that a police officer who finds lost property does not acquire any finder's rights as against the municipality which employs him (*Noble* v. *City of Palo Alto,* 89 Cal. App. 47) and this rule has been held applicable even if the finding occurred while the officer was off duty (*Majewski* v. *Farley,* 203 App. Div. [N.Y.] 77). Similarly, it has frequently been held that if an employee, especially one under a duty to turn found objects over to his employer (cf. A. W. 79, 80), finds an object, he does so as agent for his employer who thereby acquires the status of a finder. *Jackson* v. *Steinberg,* 186 Oregon 129, 138, 146; *Hannah* v. *Peel,* [1945] K.B. 509;

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[17] On the close relationship between looting and finding property abandoned by civilian population see Spaight, *ibid,* at 196. Manual for Courts Martial, U.S. Army, (1951 ed.) p. 338, includes in the term "looting or pillaging" the appropriation of property left behind by the civilian population.

[18] This is by no means mere speculation. There was a serious conflict of testimony in the instant case as to the circumstances under which petitioner reported the finding of the money. Cf. Commissioner's Report pars. 4 and 10 (R. 3, 4).

McDowell v. *Ulster Bank,* 33 Irish L. T. 225, 60 Alb. L. J. 346; *Mathews* v. *Harsell,* 1 E. D. Smith [N.Y.] 393; Aigler, *Rights of Finders,* 21 Mich. L. R. 664, 680-681; Salmond, *Jurisprudence* (9th Ed. 1937) 384.

2. Petitioner seems to claim that the retention of the money by the United States would amount to a confiscation of private property in violation of Arts. 46(2) and 53 of the Hague Convention (*infra,* p. 12). But these provisions were adopted for the benefit of the civilian population of the occupied country and not for the benefit of personnel of the invading army. The United States denies petitioner's claim because the money found by him is either public property of the enemy which belongs to the United States (Hague Convention, Art. 53, *infra,* p. 12; A. W. 79) or found private property as to which the United States, and not petitioner, acquired the finder's status (A. W. 80). Neither contention is in conflict with the Hague Convention. And if the position taken by the United States should violate any rule of international law such supposed wrong would subject the United States only to an international claim by the French Government and possibly to one by the loser of the money under the Foreign Claims Act.[19]

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[19] Act of Jan. 2, 1942, as amended, 55 Stat. 880, 31 U.S.C. 224d to 224i.

CONCLUSION

The decision below is correct, there is no conflict of decisions and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1952.

APPENDIX

1. The Annex to the Hague Convention respecting the Laws and Customs of War of October 18, 1907 (36 Stat. 2277, 2295) provides in pertinent part:

> Art. 46 * * *
>
> par. 2. Private property cannot be confiscated.
>
> Art. 47. Pillage is formally forbidden.
>
> Art. 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State * * *.

2. The Articles of War (41 Stat. 787, 10 U.S.C. 1472 ff) provided in pertinent part:

> A.W. 2 [10 U.S.C. 1473]. The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *
>
> (a) All officers * * *.
>
> A.W. 75 [10 U.S.C. 1547]. Any officer or soldier who, before the enemy, * * * quits his post or colors to plunder or pillage * * *, shall suffer death or such other punishment as a court martial may direct.
>
> A.W. 79 [10 U.S.C. 1551]. All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure

such property or is guilty of wrongful appropriation thereof shall be punished as a court martial may direct.

A.W. 80 [10 U.S.C. 1552]. Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

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